No. 14,955

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD RAYMOND EGE, JOSEPH BOYD and JOSEPH VICTOR BRUNO,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S REPLY BRIEF.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Questions presented	Preface
Jurisdiction	1
Statement of the case	1
The defendants	3
The facts	4
Argument	10
I. There is no prejudicial variance between the conspiracy charge and the conspiracy proof	10
II. The evidence is sufficient	18
III. There need not be direct evidence that appellant Bruno knew Constance Marie Bell was transported in interstate commerce	29
IV. Overt acts committed in the Northern District of California were proved	35
V. A special verdict was unnecessary	43
VI. The jury was instructed its verdict must be unanimous	46
VII. The remarks of the court and government counsel were not prejudicial	47
VIII. Appellants were properly charged with conspiracy to violate Section 2421 of Title 18 United States Code, and appellant was properly charged with a substantive violation of that section	54
IX. The counts in the indictment need not have been separated	58
Conclusion	60
Appendix	

Table of Authorities Cited

Cases	Pages
Adkins v. Brett, 184 Cal. 252	24
Adolfson v. U. S. (9th Cir. 1947) 159 F.2d 883	20
Allen v. U. S., 4 F.2d 688	22, 38
American Tobacco Company v. U. S., 328 U.S. 781	22
Anderson v. U. S. (9th Cir.) 273 Fed. 677	43
Aplin v. U. S. (9th Cir. 1930) 41 F.2d 495	30
Barcott v. U. S. (9th Cir.) 169 F.2d 929	10, 39
Baush Machine Tool Co. v. Aluminum Company of America, 79 F.2d 217	21
Beard v. U. S. (1936) 82 F.2d 837	54
Bedell v. U. S., 78 F.2d 358	21
Berger v. United States (1935) 295 U.S. 78	11, 16, 17
Blackford v. U. S. (10th Cir. 1952) 195 F.2d 896	35
Blumenthal v. United States (1947) 332 U. S. 539	11, 13, 14, 15, 16, 17
Bridgman v. United States (9th Cir. 1950) 183 F.2d 750	17
Briggs v. U. S. (10th Cir. 1949) 176 F.2d 317	28
Bruno v. U. S. (9th Cir. 1933) 67 F.2d 416	44
Canella v. United States (9th Cir. 1946) 157 F.2d 470	17
Chevillard et al. v. U. S. (9th Cir. 1946) 155 F.2d 929	20
Clark v. U. S. (5th Cir.) 213 F.2d 63	33
Coates v. United States (9th Cir.) 59 F.2d 173	12, 22, 38
Cornett v. U. S., 7 F.2d 531	37
Cramer v. United States (1944) 325 U.S. 1	44
Daeche v. United States (2d Cir. 1918) 250 Fed. 566	19
D'Aquino v. U. S. (9th Cir. 1951) 192 F.2d 338	20
Davena v. U. S., 198 F.2d 230	20, 26
Direct Sales Company v. U. S., 319 U.S. 703	32
Gage v. United States (9th Cir.) 167 F.2d 122	11
Galatas v. U. S. (8th Cir.) 80 F.2d 15	12, 31
Gendelman v. U. S. (9th Cir.) 191 F.2d 993	11, 39
Glasser v. United States, 315 U.S. 60	11, 25
Gray v. United States (8th Cir. 1949) 174 F.2d 919	43

Pages
Henderson v. United States (9th Cir.) 143 F.2d 681 .....11, 39
Heskett v. U. S. (9th Cir.) 58 F.2d 897 43

Interstate Circuit v. United States, 306 U.S. 208 55

Kepl v. United States (9th Cir.) 299 F. 590 44
Kotteakos v. United States (1946) 328 U.S. 750 ..10, 11, 15, 16, 17

Langford v. U. S. (9th Cir. 1949) 178 F.2d 48 30
Lawrence v. U. S. (9th Cir.) 162 F.2d 156 56
Ledbetter v. United States, 170 U.S. 606 42
Lee v. U. S. (9th Cir. 1939) 106 F.2d 906 30
Lefco v. United States (3d Cir. 1934) 74 F.2d 66 12
Levey v. United States (9th Cir.) 92 F.2d 688 55
Luteran v. U. S. (8th Cir.) 93 F.2d 395 32

Mangum v. United States (9th Cir. 1923) 289 Fed. 213.....19, 20
Marino v. United States (9th Cir. 1937) 91 F.2d 691 ....12, 22, 55
McDonald v. United States (8th Cir.) 89 F.2d 128 .....12, 31
Mellor v. U. S. (8th Cir. 1947) 160 F.2d 757 35
Mutual Life Insurance Company v. Hellman, 145 U.S. 285.. 22

Ochoa v. U. S. (9th Cir. 1948) 167 F.2d 341..... 48
Opper v. U. S. (1954) 348 U.S. 84 20

Paddock v. U. S. (9th Cir.) 79 F.2d 872 21
Parmagini v. U. S. (9th Cir.) 42 F.2d 721 43
Pasadena Research Laboratories v. United States (9th Cir.)
169 F.2d 375 11
Pearlman v. United States (9th Cir. 1926) 10 F.2d 460....19, 26
People v. Alcalde, 24 Cal. 2d 177, 186 22
People v. Weatherford, 27 Cal. 2d 401 22
Peterson v. U. S., 4 F.2d 702 37
Pine v. U. S. (5th Cir.) 135 F.2d 353 33

Roberts v. United States (9th Cir.) 248 F. 873 55
Robinson v. United States (9th Cir.) 33 F.2d 238 55
Rubio v. U. S. (9th Cir.) 22 F.2d 766 43

Samuel v. United States (9th Cir. 1948) 169 F.2d 787 44
Schrader v. U. S. (8th Cir. 1948) 94 F.2d 926 56
Shama v. U. S. (8th Cir. 1938) 94 F.2d 1 30

Pages

Smith v. United States, 348 U.S. 147 20
Stromberg v. California (1930) 283 U.S. 359 44
Sullivan v. U. S. (9th Cir.) 32 F.2d 992 54

Tedesco v. U. S. (9th Cir.) 118 F.2d 737 30

U. S. v. Angelo (3d Cir. 1946) 153 F.2d 247 48
U. S. v. Bazzel (7th Cir.) 187 F.2d 878 34
United States v. Buckner, 108 F.2d 921 55
U. S. v. Bucur (7th Cir. 1952) 194 F.2d 297 34
U. S. v. Crimmins (2d Cir.) 123 F.2d 271 33
U. S. v. Mack (2d Cir. 1940) 112 F.2d 290 33
U. S. v. Noble (3d Cir. 1946) 155 F.2d 315 43
U. S. v. Rosenberg (2d Cir. 1952) 195 F.2d 583 .....15, 16
U. S. v. Socony Vacuum Oil Company, 310 U.S. 150 11
U. S. v. Thayer (7th Cir. 1954) 209 F.2d 538 47

Van Huss v. U. S. (10th Cir. 1952) 197 F.2d 120 33
Van Riper v. United States, 13 F.2d 961 55

Wagner v. U. S. (5th Cir.) 171 F.2d 354 57
Wibye v. U. S., 87 Fed. Supp. 830 22
Wiggins v. U. S. (9th Cir.) 64 F.2d 950 20
Williams v. North Carolina (1944) 317 U.S. 287 44
Woitte v. U. S. (9th Cir.) 19 F.2d 506 43
Womble v. U. S. (9th Cir. 1945) 146 F.2d 263 29
Wright v. U. S. (8th Cir.) 175 F.2d 384 56
Wynkoop v. United States (9th Cir. 1927) 22 F.2d 799 19

Younge v. U. S. (4th Cir. 1917) 242 Fed. 788 42

Statutes

18 United States Code:
Section 371 .....App. i, vi
Section 2421 .....54, 57, App. i, vi
Section 2422 .....54, 57
Section 3231 1

28 United States Code:
Section 1291 1
Section 1294(1) 1

Rules

Federal Rules of Criminal Procedure: Pages
Rule 8a 58, 60
Rule 30 52
Rule 52b 48

Texts

Wigmore on Evidence, 3d Ed., Section 1770 21

QUESTIONS PRESENTED.

1. Is there prejudicial variance between the conspiracy charge and the conspiracy proof?

2. Is the evidence sufficient?

3. Must the corpus delicti be established independently of the admissions of the defendant?

4. Is there evidence aliunde against each co-conspirator?

5. Must proof of intent to transport in interstate commerce be established by direct evidence?

6. Must there be a special verdict on each overt act of a conspiracy charge?

7. Were the court's instructions proper?

8. Were any remarks of the court or government counsel prejudicial?

9. Were appellants properly charged under Section 2421 of Title 18 United States Code?

10. Were the defendants in the indictment properly joined under Rule 8a of the Federal Rules of Criminal Procedure?

No. 14,955

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD RAYMOND EGE, JOSEPH BOYD and JOSEPH VICTOR BRUNO,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S REPLY BRIEF.

JURISDICTION.

Jurisdiction is invoked under Section 3231 of Title 18 and Sections 1291 and 1294(1) of Title 28, United States Code.

STATEMENT OF THE CASE.

Appellants were indicted on June 15, 1955 (Tr. 7). Appellant Ege was charged with transporting women in interstate commerce for the purpose of prostitution and with conspiracy to transport women in interstate commerce (Tr. 3-7). The other appellants were named in the conspiracy count only (Tr. 3-7). A mo-

tion to dismiss the indictment on the grounds that the indictment did not state an offense was filed and denied (Tr. 11, 25). A bill of particulars was filed by the government stating the dates on or about which the overt acts, in pursuance of the conspiracy, allegedly occurred, and alleging that Constance Marie Bell was one of the women whom appellants conspired to transport and the woman alleged to have been transported in the substantive count of the indictment (Tr. 15-16). On September 26 a motion for "separate trial of counts of the indictment" was heard and denied (Tr. 25). Thereafter a jury was impaneled and appellants were tried before United States District Judge Edward P. Murphy (Tr. 25). At the close of the government's case appellants moved for judgment of acquittal. This motion was taken under submission by the court (Tr. 27, 280). The record does not disclose whether a motion for judgment of acquittal was made at the close of the whole case or what were the grounds of the motion made at the close of the government's case. After argument by all counsel and instructions by the court the case was submitted to the jury for decision (Tr. 29, 360, 365). After deliberating an hour and ten minutes the jury found appellants guilty of all counts of the indictment in which they were charged (Tr. 29-31). The motions for judgment of acquittal were then denied (Tr. 30). Motions for a new trial were made and denied, and motions for arrest of judgment were made and denied (Tr. 30, 37). Appellant Ege was sentenced to a term of five years on the first count and five years on the second count, to run con-

currently (Tr. 38). The other appellants were sentenced to five year terms (Tr. 38). Appeal was then timely made to this Court (Tr. 46, 47).

THE DEFENDANTS.

Edward Raymond Ege.

Appellant Ege was a procurer of women for houses of prostitution (Tr. 64, 65, 66-68, 70, 71). The witness Constance Marie Bell testified that Ege had arranged for her employment at brothels in Folsom, California (Tr. 67, 68, 69), Scottsdale, Arizona (Tr. 71), Delano, California (Tr. 77), Isleton, California (Tr. 81), Newberry, California (Tr. 83), Las Vegas, Nevada, at "Roxy's" place (Tr. 86), and Suisun, California (Tr. 89). Various women lived at his home at 396 Monterey Boulevard, in San Francisco (Tr. 95, 103, 111). At the time of the indictment three or four girls worked as prostitutes for his benefit (Tr. 98). One of these girls was his wife (Tr. 99, 104). At least some of the women staying at his home in San Francisco were prostitutes, including both Constance Marie Bell and one Judy Berg, who traveled from San Francisco to Scottsdale, Arizona with Bell (Tr. 71, 102). At this time Ege also owned a bordello in Folsom, California, with one Frank Alvernaz (Tr. 69, 287).

Joseph Victor Bruno.

Appellant Bruno, in the period covered by the indictment, owned a brothel in Delano, California (Tr. 79). He apparently also operated this brothel

(Tr. 80). He employed Constance Marie Bell in his house of prostitution in the latter part of October and the first part of November, 1953 (Tr. 137). At that time he offered the services of three or four prostitutes (Tr. 137). Apparently he had operated there for several years prior to the indictment.

Joseph Boyd.

Appellant Boyd operated a brothel in Scottsdale, Arizona, during October of 1953 (Tr. 201, 203, 216). He advertised girls from California (Tr. 212). Constance Marie Bell and Judy Berg were employed in his bordello (Tr. 75). Boyd admittedly knew Bruno and the fact that Bruno operated a house of prostitution in Delano, California (Tr. 237, 245, 246). He was also aware that Constance Marie Bell had gone to Delano, California, from his brothel in Scottsdale, Arizona (Tr. 245). He was a friend of Ege's (Tr. 288). He had, in fact, turned over to Ege the home in San Francisco in which the prostitutes Constance Marie Bell and Judy Berg were maintained prior to coming to his bordello in Arizona (Tr. 196).

THE FACTS.

The conspiracy in this case was apparently formed in San Francisco some time prior to June, 1953. In May or June of that year, appellant Ege assumed the lease of the premises at 395 Monterey Boulevard from appellant Boyd (Tr. 200). 395 Monterey Boulevard was a stopping off place for prostitutes (Tr. 67,

102). Ege procured the girls (Tr. 96). Two of the girls who stopped at 395 Monterey Boulevard went to Scottsdale to work at the Boyd brothel (Tr. 75). Ege, at the time of the trial, admitted that both Bell and Berg stayed at the Monterey Boulevard residence and that "other kids stayed there—a lot of kids stayed there." (Tr. 309, 310).

The first overt act of the conspiracy count of the indictment reads as follows:

> "1. In June, 1953, defendants Joseph Boyd, alias Joe Boyd, and Edward Raymond Ege, went to 2545 Noriega Street, San Francisco, California, State and Northern District of California."

At 2545 Noriega Street—a market owned by Mr. Gene Giomi—appellant Ege took over the lease on the home at 395 Monterey Boulevard from appellant Boyd (Tr. 196, 308). The Monterey Boulevard property was utilized as a rendezvous for prostitutes sent from San Francisco to Scottsdale, Arizona, for work in the Boyd bordello (Tr. 71, 102). At the time of the termination of Boyd's tenancy and Ege's assumption of the lease, Boyd, in Ege's presence, stated that he intended to leave the state (Tr. 196). He, in fact, went to Phoenix, Arizona, where he attempted to rent a motel to be used as a brothel (Tr. 211). Even prior to renting the property in Scottsdale, which he operated as a house of ill fame, Boyd informed a bar owner (Charles Briley) that he was getting two girls from California (Tr. 212). Shortly before the time of Boyd's conversation with the bar owner, Ege was

persuading Constance Marie Bell to take up the life of a prostitute (Tr. 63, 94, 172). Judy Berg, the other prostitute secured for the Scottsdale establishment, arrived at Monterey Boulevard the day after Bell was persuaded to enter prostitution (Tr. 97).

The second and third overt acts of the conspiracy count of the indictment read as follows:

> "2. In September, 1953, defendant Edward Raymond Ege, took one Constance Marie Bell from the Sarong Club, 875 Geary Street, City and County of San Francisco, State and Northern District of California, to 395 Monterey Boulevard of said City."
>
> "3. In September, 1953, at 395 Monterey Boulevard, City and County of San Francisco, State and Northern District of California, defendant Edward Raymond Ege had a conversation with Constance Marie Bell."

Constance Marie Bell's transportation from the Sarong Club to the Monterey Boulevard residence was obviously undertaken by Ege for the purpose of persuading Bell to join the prostitution racket (Tr. 62). Overt act 3 concerns the conversation had between Ege and Bell following the transportation referred to in overt act 2, in which appellant Ege painted the advantages of a prostitute's life to Bell. This conversation was an act calculated to effect one object of the conspiracy, which was to secure girls from San Francisco for the Arizona brothel.

Over act 4 charges that:

> "4. In October, 1953, defendant Edward Raymond Ege drove an automobile from Folsom,

California, to 395 Monterey Boulevard, City and County of San Francisco, State and Northern District of California."

Constance Marie Bell testified that she was taken by Ege to Folsom after spending a week at Monterey Boulevard (Tr. 68, 69). She received her training as a prostitute there (Tr. 69). Thereafter, Ege informed Bell of the job at the Boyd bordello (Tr. 71). Ege told Bell to go there with Judy Berg, apparently the other girl from California referred to in Boyd's conversation with the bar owner Charles Briley (Tr. 71, 212). Ege gave Bell $50 for the trip (Tr. 72).

Overt act 5 alleges that Bell received the telephone number of Boyd from Ege. However, it appears that Judy Berg, rather than Bell, actually recorded the number (Tr. 73). The number, however, was discussed in her presence (Tr. 73). The girls then drove to Phoenix, Arizona, utilizing the $50 supplied by Ege for the expenses of the trip (Tr. 117). They 'phoned Joseph Boyd but did not reach him. Thereafter, however, contact was made by telephone (Tr. 73). The girls were then driven to Scottsdale, and Bell began to work for Boyd as a prostitute (Tr. 74, 76).

Business was bad at Scottsdale and Ege, who had remained in San Francisco (Tr. 123), telephoned Bell to tell her to go to Delano, California (Tr. 76, 77). In this conversation Ege indicated that Delano, California, was "opening" (Tr. 77) and that she was to fly there (Tr. 78). Appellant Ege gave Bell appellant Bruno's telephone number and told her to call

Bruno when she changed planes at Burbank. She was to tell Bruno what time the plane was to arrive in Bakersfield (Tr. 78). It is to be noted that overt act 8, which reads as follows, "8. In October, 1953, Constance Marie Bell in the State of Arizona had a telephone conversation with Edward Raymond Ege in the City and County of San Francisco, State and Northern District of California.", refers to the above conversation where the transportation of Bell from Arizona to Delano was effectuated.

Bell did fly to Bakersfield from Phoenix, Arizona, in accordance with Ege's instructions (Tr. 78). While changing planes in Los Angeles she telephoned Joseph Bruno's establishment (Tr. 78). On her arrival in Bakersfield she was met by appellant Joseph Bruno (Tr. 78). Bruno then drove Bell from Bakersfield to his Delano, California, house of prostitution in his Cadillac automobile (Tr. 78). It is to be noted that overt act 9 reads as follows:

> "9. In October, 1953, defendant Joseph Victor Bruno drove Constance Marie Bell from Bakersfield, California, to Delano, California."

Bell worked as a prostitute in Delano for approximately two or three weeks (Tr. 80). Bruno's principal activity at the house of prostitution was apparently concerned with the counting of the money obtained by the girls from their customers (Tr. 80).

After leaving Bruno's brothel, Constance Marie Bell was met by appellant Ege in Fresno and driven back to the Monterey Boulevard residence in San Francisco secured from Boyd (Tr. 80). The money

earned by Bell from her work as a prostitute in Delano and Arizona was given by her to appellant Ege in either San Francisco or Fresno (Tr. 186). Overt act 10 reads as follows:

> "10. In October, 1953, in the City and County of San Francisco, State and Northern District of California, defendant Edward Raymond Ege took the sum of approximately $700 from Constance Marie Bell."

In November of 1953, Bell went to Barstow, California, where she entered into work as a prostitute at Newberry, California (Tr. 85). This trip was taken on the instance of appellant Ege (Tr. 155) and Ege received the $100 or $200 Bell earned (Tr. 155, 188, 189). Overt act 13 reads as follows:

> "13. In November, 1953, in the City of Barstow, State of California, defendant Edward Raymond Ege took the sum of approximately $900 from Constance Marie Bell."

Overt act 14 reads as follows:

> "14. In December, 1953, defendant Edward Raymond Ege drove Constance Marie Bell from the City of Barstow, State of California, to the City of Las Vegas, State of Nevada."

Constance Marie Bell testified that Ege drove her in his Cadillac automobile from Barstow to Las Vegas, Nevada, where she worked at one "Roxy's" one day as a prostitute (Tr. 87).

ARGUMENT.

I. THERE IS NO PREJUDICIAL VARIANCE BETWEEN THE CONSPIRACY CHARGE AND THE CONSPIRACY PROOF.

It is the contention of appellants that the evidence in the case necessarily proves two rather than one conspiracy and the fact that one conspiracy only was charged resulted in a prejudicial variance between the charge and the proof under the rule of *Kotteakos v. United States* (1946) 328 U.S. 750. Appellants do not contend that the court below instructed that the jury might convict even if it found that more than one conspiracy existed between the appellants. Indeed, they could not so contend since the court told the jury:

> "You are instructed that the evidence must establish the conspiracy charged; evidence that establishes another conspiracy or several other conspiracies will not sustain a verdict."

The gist of the argument appears to be the contention that Boyd and Bruno each participated in separate unrelated acts, and that the government has "produced the hub, and a loose spoke or two, but no rim to tie them together in a related whole." (Appellant Bruno's brief, p. 49).

There is no burden on the government in this proceeding to establish that the evidence in the case was *only* susceptible of the inference that one general conspiracy was formed between appellants. On appeal, the appellate court must adopt the inferences most favorable to the government's case.

Barcott v. United States (9th Cir.) 169 F.2d 929, 931, cert. denied;

Henderson v. United States (9th Cir.) 143 F.2d 681;

Pasadena Research Laboratories v. United States (9th Cir.) 169 F.2d 375, cert. denied;

Gendelman v. United States (9th Cir.) 191 F.2d 993.

Neither is this Court concerned with the weight of the evidence bearing on this issue. All that is required is that there be substantial evidence in the record indicating that appellants engaged in one general conspiracy.

Glasser v. United States, 315 U.S. 60;

Gage v. United States (9th Cir.) 167 F.2d 122, 124;

United States v. Socony Vacuum Oil Company, 310 U.S. 150, 254.

Furthermore, even if two conspiracies were proved, appellants are not entitled to a reversal unless this variance, if variance there be, deprived them of a fair trial.

Kotteakos v. United States, supra;

Berger v. United States (1935) 295 U.S. 78.

The conspiracy formed one broad scheme.

It is not necessary that a conspirator know all the details of the conspiracy or of the participation of others in the scheme.

Blumenthal v. United States (1947) 332 U.S. 539, 557.

Secrecy and concealment are essential features of a successful conspiracy. A conspirator need only know the essential nature of the plan.

Marino v. United States (9th Cir. 1937) 91 F. 2d 691;

Lefco v. United States (3rd Cir. 1934) 74 F.2d 66.

The knowledge of the membership of the conspiracy is immaterial as is also a knowledge of how the spoils are to be divided.

Coates v. United States (9th Cir.) 59 F.2d 173.

If a defendant aids the conspirators, knowing in a "general way" their purpose to break the law, a jury may infer that he entered into an agreement with them.

McDonald v. United States (8th Cir.) 89 F.2d 128;

Galatas v. United States (8th Cir.) 80 F.2d 850.

In the instant case, appellants have pointed out the obvious fact that each conspirator had a definite part to play in the conspiracy and a definite interest in some aspect of it not shared by the other conspirators. Boyd, to be sure, was more interested in the transportation of Constance Marie Bell from San Francisco to Phoenix, Arizona than he was in her transportation from Phoenix to Delano, California. His business was located in Arizona. His pecuniary interest in the plan concerned the work that Bell and Berg did at his establishment. Bruno, on the other

hand, operated his place in Delano, California and was most interested and most concerned with Constance Marie Bell's services in his brothel and in the transportation that made those services available to him. Ege, of course, was equally concerned with all the transportations since each resulted in his financial advancement.

In *Blumenthal v. United States,* supra, appellants were involved in a conspiracy to sell black market whiskey. The case involved three salesmen and two owners of a distributing company. Each salesman, of course, was only interested in the particular whiskey which he sold. Furthermore, the salesmen were not aware that another individual, known to the two owners of the distributing company, actually owned the whiskey. A contention was made that several agreements were involved. The Supreme Court, however, rejected the argument.

The court held that each agreement formed in the case was merely a step in the formation of the larger and ultimately more general conspiracy (at 557).

In the case before this Court, appellant Bruno must have known that he was acquiring the services of one who had worked at brothels before and who would be employed by brothels other than his own in the future. The evidence adduced at the trial indicated that prostitutes are engaged in the same kind of "here today and gone tomorrow" business as those who, in days past, entertained on the vaudeville circuits. Bell, herself, was at many houses in the few months covered by the indictment. Boyd knew when Bell left his

place that she would go somewhere else, most probably to a place selected by her California residing "pimp." He also knew that if she continued to engage in the prostitution business she would probably work at his house again. Bell was launched by Ege on the prostitution circuit. Each individual brothel owner, while playing his own special part in the scheme to transport prostitutes in interstate commerce, would of necessity know that other brothel owners would be involved, each playing a part in the conspiracy similar to his own but in different places and at different times.

There is a clear analogy between the facts in the instant case and the facts in the *Blumenthal* case. To be sure, here the services of a prostitute are involved rather than blackmarket whiskey. However, one lot of whiskey was involved in the *Blumenthal* case and the proof in the instant case involves, for the most part, one prostitute. While Bruno's part in the conspiracy was apparently limited to the transportation from the Boyd brothel in Arizona to his brothel at Delano, California he had knowledge that his participation was a part of a larger plan, that is, the shipment of Bell from place to place in accordance with the demand in various localities for prostitutes. It cannot be argued that the fact that Boyd and Bruno are not shown to have ever met during the course of the conspiracy precluded their membership in one broad illegal scheme. The court observed, in *Blumenthal v. United States,* supra, at (pages) 556 and 557:

> "The law does not demand proof of so much. For it is most often true, especially in broad schemes calling for the aid of many persons, that

> after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and the conspirators would go free by their very ingenuity."

The metaphor of the spokes and the rims of wheels is possibly of little help in this case. It should be observed, however, that the victim in this case was a prostitute traveling on a prostitution circuit. Two of the places she stopped on the way were Boyd's and Bruno's brothels. In fact, she traveled from one to the other. Boyd and Bruno, whether spokes or part of the rim, were brothel owners causing the transportation of a prostitute from one place of employment to the other. In this case, one prostitute common to all was involved, just as in the *Blumenthal* case one lot of blackmarket whiskey was involved but in *Kotteakos,* a number of separate unrelated false statements were made.

In *United States v. Rosenberg* (2nd Cir. 1952), 195 F. 2d 583, an argument was made that since Zobell was involved only in a part of the secrets which were

transmitted to the Communists, his inclusion in the trial of the Rosenbergs, who were involved with atomic secrets, was improper. The court, however, rejected the argument. In the *Rosenberg* case, as here, all defendants were actuated by a single unified purpose; in this case, the transportation of Bell in interstate commerce for the purpose of employment on the prostitution circuit.

We believe that the observation of the court in the *Blumenthal* case expresses our views in this case.

> "We think, therefore, that in every practical sense the unique facts of this case reveal a single conspiracy of which the several agreements were essential and integral steps, and accordingly that the judgments should be affirmed." (*Blumenthal v. United States,* supra, at 559).

There was no prejudicial mass trial here.

In order to secure a reversal of their conviction appellants must show more than a mere variance between the charge and the proof. They must show that the variance prejudiced their right to a fair trial. The real dangers in a case where one conspiracy is charged but a number of conspiracies are proved is the danger that guilt will be transferred from one to another from the effect of a mass trial and the inability of counsel to determine the nature of the offense he is called upon to defend. In *Kotteakos v. United States,* supra, the Supreme Court distinguished *Berger v. United States,* supra, on the grounds that in the *Kotteakos* case, although one conspiracy was charged, 8 conspiracies were proved. The court observed that in *Berger* there were but 2 con-

spiracies and 4 defendants, while in *Kotteakos* there were 8 conspiracies and 32 defendants. In the instant case the most that can be claimed by appellants is that there are 2 conspiracies and 3 defendants—the same number of conspiracies as in *Berger v. United States,* but one less defendant. Thus by the very reasoning of *Kotteakos v. United States* itself there is no prejudicial variance here.

Appellant Ege is not benefited by the variance argument at all. All the cases agree that the prime conspirator cannot complain that other persons accused of conspiring with him are not proved connected with each other.

Canella v. United States (9th Cir. 1946);
Kotteakos v. United States, supra.

In *Bridgman v. United States* (9th Cir. 1950) 183 F.2d 750, this Court expressed the true principle involved in the *Kotteakos* case. The prohibition is against mass trials. Here there were a limited number of defendants. There is no problem in this case of the guilt of one defendant being confused with the guilt of the other defendants, as in the case of *Kotteakos* where 32 defendants were charged. In *Blumenthal v. United States* the court discussed the risks common to mass trials (at page 560) and observed that, in view of the trial court's caution, the risk of transference of guilt was reduced to the minimum. The instruction there read as follows:

> "The guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone."

The instruction in the instant case was even more solicitous for the appellants' right to have their case tried on its own merits. It reads as follows:

> "Although the indictment in this case charged three defendants with the offenses set forth therein, you are instructed that you must determine the guilt or innocence of each defendant in this case as if he were the only defendant on trial. Each defendant has the right to have you consider his individual guilt or innocence independently from the guilt or innocence of the other defendants in the case." (Tr. 349).

In view of the nature of the evidence in this case, the limited number of defendants, and the scrupulously fair instructions of the court, even if the court accepts the appellants' contention that several conspiracies rather than one general conspiracy were proved, no fatal variance has been shown.

II. THE EVIDENCE IS SUFFICIENT.

All relative evidence can be considered.

In discussing the sufficiency of the evidence, appellant Boyd, from page 31 through 34, lists a number of items of evidence which he claims cannot be considered against Boyd to determine his guilt. This evidence falls into two categories. The first involves statements made by other conspirators during the existence of the conspiracy, and the second involves statements made by the defendant Boyd himself.

Appellant Boyd argues, in reference to the statements made by him, that the court must disregard

them under what he calls, "The rule that the corpus delicti cannot be established by the extrajudicial statements, admissions, or confessions of the accused." (Page 31, Boyd brief). The rules of evidence, however, do not require such a result. The Ninth Circuit has never had the rule that the corpus delicti must be established independently of the extrajudicial statements of the defendant. Indeed, the very cases cited by appellant,

Wynkoop v. United States (9th Cir. 1927) 22 F.2d 799;

Mangum v. United States (9th Cir. 1923) 289 Fed. 213, and

Daeche v. United States (2d Cir. 1918) 250 Fed. 566

support the contrary rule, which is merely that the confession of a defendant must be corroborated. Judge Learned Hand in *Daeche v. United States,* supra, when discussing that the older view to the corpus delicti must be established independently of confession said,

> "But such is not the more general rule which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof."

In *Pearlman v. United States* (9th Cir. 1926) 10 F.2d 460 this Court took the lead in rejecting the rule sought to be applied by appellant Boyd. The case was

cited with approval in the Supreme Court case of *Smith v. United States,* 348 U.S. 147, at page 156.

See also:

Mangum v. U.S. supra, at 216;
Davena v. U.S., 198 F.2d 230;
Wiggins v. U.S. (9th Cir. 1933) 64 F.2d 950-952 cert. denied;
Chevillard v. U.S. (9th Cir. 1946) 155 F.2d 929 at 935;
Adolfson v. U.S. (9th Cir. 1947) 159 F.2d 883 cert. denied;
D'Aquino v. U.S. (9th Cir. 1951) 192 F.2d 338 at 357, cert. denied.

The Supreme Court, itself, relying on the *Pearlman* case, supra, rejects the statement made by counsel that, "The extrajudicial statements of a defendant are inadmissible in the absence of independent proof of the corpus delicti." (Page 31, appellant's brief). In *Opper v. U.S.,* 348 U.S. 84, 1954, at 92, 93, the Supreme Court of the United States considered the corroborations necessary for admissions, and after reviewing the authorities, stated,

> "However, we think the better rule to be that the corroborative evidence need not be sufficient independent of the statements to establish the corpus delicti."

In asking this Court to disregard the statements made by Boyd, appellant is simply asking this Court to rely on a rule which has long been repudiated by it.

Furthermore, the statements made by Boyd to Charles W. Briley, the owner of the Pink Pony Bar

in Scottsdale were not admissions at all, but were statements made in pursuance of a conspiracy and constituted acts calculated to effect the object of the conspiracy.

The defendant Boyd discussed with the bar owner Briley his interest in acquiring a residence in Scottsdale, Arizona to be used for the purpose of prostitution (Tr. 210-211). He told Mr. Briley that he was getting two girls from California (Tr. 212). Mr. Boyd, in other words, was advertising his wares. He was acquainting his market in Scottsdale with the merchandise he had to offer. It may well be that a California product would be of more interest and of a more saleable nature than the local product.

The conversation with Mr. Briley by Mr. Boyd was not an extrajudicial admission. It constituted a verbal act. The act in this case was one of advertising prostitutes to be secured by an interstate transportation. As Wigmore indicates in Section 1770 (Wigmore on Evidence, 3d Ed.), this kind of utterance may be proved wthout violation of the hearsay rule because the utterance is not offered to evidence the truth of the matter which may be asserted within it. See for example *Baush Machine Tool Co. v. Aluminum Company of America,* 79 F.2d 217, 220, 224, where the court admitted evidence of a conversation quoting prices, and see also *Bedell v. U.S.,* 78 F.2d 358. In *Paddock v. U.S.* (9th Cir.) 79 F.2d 872, this Court reversed the lower court for excluding conversations detailing employment terms.

This conversation would also be admissible under another exception to the hearsay rule as a declaration of present intention. That is an intention to import prostitutes into Arizona from California. See

Mutual Life Insurance Company v. Hellman, 145 U.S. 285;

People v. Weatherford, 27 Cal. 2d 401, 421, 422;

People v. Alcalde, 24 Cal. 2d 177, 186;

Wibye v. U. S. (D.C. N.D. Ala.), 87 Fed. Supp. 830, 832.

This evidence was admissible and relevant to prove Boyd's crime and need not have been disregarded by the jury and should not now be disregarded by this Court.

Evidence that co-conspirators acted in concert with Boyd may be considered against him.

Evidence of action in concert is sufficient to show a conspiracy.

American Tobacco Company v. U. S., 328 U.S. 781.

A common design is the essence of a conspiracy and such a design may be made to appear when the conspirators steadily pursued the same object whether acting separately or together by common or different means, all leading to the same unlawful result.

Allen v. U. S., 4 Fed.2d 688, 691;

Coates v. U. S., 50 Fed.2d 173, 174.

Part of the evidence which appellant Boyd contends should be disregarded concerns the appellant Ege's meeting with Constance Bell, the acts and declaration

by which he convinced her to begin a life of prostitution (appellant Boyd's brief, page 32) and in addition Ege's declaration to Bell that there was a job for Judy Berg and her in Phoenix, Arizona. (Appellant Boyd's brief, page 32.) Shortly after both those conversations appellant Boyd had the conversation referred to above with Mr. Charles W. Briley (Tr. 210-212). In this conversation Mr. Boyd referred to two girls that were to come from California (Tr. 212), obviously referring to Constance Marie Bell and Judy Berg, who did, in fact, come to his house of prostitution (Tr. 117, 74, 76). The fact that Mr. Boyd had a conversation with Briley concerning two girls from California becomes evidence of a conspiracy between Ege and Boyd, because shortly prior to the conversation Ege had secured two girls to work in the Boyd bawdy house. Here we have the evidence of acting in concert in pursuance of a common design for the accomplishment of a common purpose, which is referred to in *Marino v. United States* (9th Cir.), 91 F.2d 691, cert. den., cited by appellants.

Since a conspiracy requires two persons or more it follows that acts done by others in pursuance of its object must be admissible against a defendant in order that his connection with the conspiracy may be shown. In a narcotic case when arrangements are made by one co-conspirator for a sale of narcotic delivery to take place at a certain time and at a certain place, the conduct of the other co-conspirator in arriving at that certain place, at that certain time with the narcotics becomes evidence of a conspiracy only by refer-

ence to the declarations of the other co-conspirators. Any declarations, therefore, by co-conspirators which tends to show a concert of action between them is admissible against them, even though all the conspirators are not present at the time of the declaration.

Appellant Boyd's objection to the evidence of declaration by others than himself seems to be grounded on the view that evidence is not admissible unless the defendant was present. Counsel apparently is of the same view as many lawyers who feel that if activities do not take place in the presence of the defendant evidence of those activities are inadmissible. Justice Olney of the California Supreme Court had occasion to comment on this view in the case of *Adkins v. Brett,* 184 Cal. 252. The court said at pages 254-255:

> "One objection to the evidence of these conversations, which may as well be disposed of at the outset as involving the most elementary principles of evidence, is that they were had without the presence of the defendant. The answer to this objection is that it is wholly immaterial whether the defendant was present or not. The competency of evidence of declarations or statements by a person other than the party to the action against whom they are introduced is not affected merely by the latter's presence or absence. If the evidence be not competent if the party against whom it is sought to introduce it was not present when the statements or declarations were made, no more is it competent if he were present. There are apparent exceptions to this, but they are only apparent and not real exceptions . . ."

In a conspiracy case, as has been stated above, evidence of the acts and declarations of co-conspirators are necessarily admissible against a defendant for the light that they throw on the defendant's conduct. If his conduct, in conjunction with their's, shows the necessary concert of action, the conspiracy charge is made out. Just as it takes the evidence of the conduct of two parties to prove a contact, it takes evidence of the conduct of at least two co-conspirators to make a conspiracy.

Appellant Boyd argues that the declaration of Ege referred to above cannot be considered against him because there is lack of proof *aliunde* of a conspiracy. We agree with appellant that there must be evidence *aliunde* before declarations of one co-conspirator are admissible against another.

Glasser v. U. S., 315 U.S. 60.

This rule is, however, subject to the limitation that the acts and declarations of one must be considered in conjunction with the acts and declarations of the other.

In one sense the acts and declarations of Boyd with reference to the bar owner Briley from the necessary independent evidence to make the declarations of Ege admissible against him. Clearly what the court intends by requiring independent evidence or evidence *aliunde* is merely that a defendant's connection with a conspiracy be shown before he can be found guilty of a conspiracy. Once his connection with the conspiracy is shown, and it can be shown only in connection with the acts of his co-conspirators, their acts and declarations past, present and future become binding on him.

There is sufficient corroboration of Boyd's admissions.

Boyd admitted that he operated a brothel in Scottsdale, Arizona (Tr. 243). He admitted also that Constance Marie Bell and Judy Berg had worked for him there (Tr. 243). He also said that he knew Bruno had been operating a house of prostitution in Delano and he knew that Bell had gone there to work (Tr. 245-246). He also admitted that there had been a number of telephone conversations between Ege and him while he was in Scottsdale (Tr. 244). As a matter of fact, he stated to Special Agent Andrus of the Federal Bureau of Investigation, "Well, if taking telephone calls is conspiracy, then I have committed conspiracy" (Tr. 243). All this evidence is admissible under the rule in *Davena v. U. S.*, supra, and *Pearlman v. U. S.*, supra, because it has been sufficiently corroborated. There was evidence that Boyd had advertised two prostitutes were coming from California (Tr. 212). Bell testified that she and Judy Berg did, in fact, come to Scottsdale from San Francisco for the purpose of practicing prostitution and did practice prostitution in Boyd's bordello (Tr. 117, 74, 76). The evidence of a concert of action between Ege's procurement of Bell and Boyd's advertisement of California prostitutes has already been referred to. Mr. Gene Giomi testified that a lease was transferred to Ege's from Boyd on the home at 395 Monterey Boulevard which was utilized as a rendezvous for prostitutes, at least two of which actually worked for Boyd (Tr. 71, 102, 196). Boyd's admissions are not only corroborated, but as a matter of fact, there is sufficient

evidence in the record to convict him even if they be disregarded.

There is evidence aliunde against each co-conspirator.

The fact that a number of transportations of Constance Marie Bell for immoral purposes were made is not seriously denied by any of the appellants. Each, however, attempts to limit the evidence in the case to evidence of his own acts and declarations. As was indicated above, the evidence against one co-conspirator cannot be considered in vacuum. It becomes relevant only by reference to the acts and declarations of the other co-conspirators in the case. The transfer of the lease of the rendezvous on Monterey Boulevard becomes meaningful only in conjunction with Boyd's statement that he intended to go to Phoenix, Arizona, the testimony of Constance Bell concerning the prostitutes who stayed at 395 Monterey Boulevard, and Boyd's advertisement of girls from California in Arizona.

Appellant Bruno's reception of Constance Marie Bell at the Fresno Airport becomes meaningful only in the light of instructions given by Ege to Bell in Arizona. Here is evidence of a concert of action. Bell merely telephones and says she is to arrive at an airport at a certain time and Bruno miraculously arrives and takes her immediately to his illegal place of business. Constance Marie Bell testified that Bruno met her at the airport (Tr. 78). She also testified that she was driven by Bruno from the airport to his Delano, California bawdy house (Tr. 78), and that she

worked as a prostitute there for two or three weeks (Tr. 80). There is evidence that Bruno counted the money obtained by prostitutes from their customers at his bawdy house (Tr. 80).

As to the appellant Ege it will be pointless to recapitulate the overwhelming evidence pointing towards his guilt. Ege was a principal defendant in the case. He secured Constance Marie Bell's employment in both the Boyd and Bruno brothels, and other bawdy houses as well.

There is independent evidence as to each defendant showing his connection with a conspiracy to transport women in interstate commerce for the purpose of prostitution.

In *Briggs v. U. S.*, 176 F.2d 317 (10th Cir. 1949) the court stated:

> "It is a common design which is the essence of the conspiracy or combination and this may be made to appear when the parties steadily pursue the same object whether acting separately or together by common or different means, but always leading to the same unlawful result."

Here, each conspirator had the common design causing prostitutes to be transported in interstate commerce in accordance with the need and demand for prostitutes in Arizona, Nevada, and California. Each defendant had his own part to play in the scheme. They played their parts at different times and different places, but for a common purpose. All defendants were in the prostitution racket. Ege acted as an agent,

and procured women for the two bawdy house entrepreneurs. They supplied the market for Miss Bell's particular kind of services. It took all to make the conspiracy.

III. THERE NEED NOT BE DIRECT EVIDENCE THAT APPELLANT BRUNO KNEW CONTANCE MARIE BELL WAS TRANSPORTED IN INTERSTATE COMMERCE.

Appellant Bruno argues that there was no direct evidence of appellant Bruno's knowledge that Constance Marie Bell had come from Arizona. There was no evidence that appellant Bruno had given any statement to the Federal Bureau of Investigation concerning his knowledge of Miss Bell's origin and he did not testify concerning his knowledge or lack of it at the trial. It is the contention of appellant Bruno that without direct evidence of such knowledge the jury could not infer that Bruno conspired with the others to transport prostitutes in interstate commerce.

A search of cases fails to disclose any case where this precise issue was before the court. The majority of the cases dealing with the quantum and nature of proof required to prove intent in White Slave cases deals with the defendant's intent or lack thereof that the women transported be utilized for immoral purposes.

See for example

Womble v. U. S. (9th Cir. 1945) 146 F.2d 263 where there was no direct evidence that the defendant had intended that the victim should practice prostitution. This court there observed:

> "The law is settled that in prosecutions for violation of the White Slave Act the jury or court may infer intent from all the circumstances of the evidence."

In *Langford v. U. S.* (9th Cir. 1949) 178 F.2d 48, the defendant drove the victime to Tijuana, married her, then returned to Los Angeles, where the victim began to practice prostitution. There was no direct evidence in this case that the defendant intended his wife to practice prostitution following the Tijuana marriage. This Court however, observed:

> "It is elementary that the intent, motive or purpose necessary for the establishment of a crime may rest in inference."

See also

Tedesco v. U. S. (9th Cir.) 118 F.2d 737, 741;
Shama v. U. S. (8th Cir. 1938) 94 F.2d 1;
Aplin v. U. S. (9th Cir. 1930) 41 F.2d 495.

In the *Lee* case (9th Cir. 1939) 106 F.2d 906, cited by appellants, the defendant charged with conspiracy met the victim in a house of prostitution in Seattle, removed her from the house and transported her to Portland, Oregon. The defendant testified that he did not know of the prior transportation by his co-defendants from Portland to Seattle for the purposes of prostitution and to put her in the house in which he found her. This Court observed:

> "There is no evidence to the contrary [his testimony] and nothing in the record from which the contrary may be inferred."

In this case there is no testimony that Bruno intended only to cause Constance Marie Bell to be transported in intrastate commerce. The inference presented to the jury was that Ege arranged with Bruno for the employment of Bell. There is no testimony that Ege lied to Bruno concerning the origin of Bell's transportation. Bruno, as a matter of fact, met Bell at the conclusion of her plane trip from Arizona (Tr. 78).

Here the circumstances were such that it was extremely unlikely that Bruno was under any misapprehension as to Bell's place of origin. In any event, however, Bruno did not raise this issue at the trial. If Ege or Bell told him that she traveled only in California appellant Bruno did not choose to place this evidence in the record. The jury did not require to make an inference not supplied to it by the evidence. The fact was that Bell came from Arizona. There is no evidence that Bell or Ege made any concealment of that fact. The jury, therefore, was not required to find that they did so.

Bruno is charged with a conspiracy to violate the White Slave Act. When a defendant aids conspirators knowing in a "general way" their purpose to break the law the jury may infer that he entered into an agreement with them.

McDonald v. U. S. (8th Cir.) 89 F.2d 128;
Galatas v. U. S. (8th Cir.) 80 F.2d 15.

In this case Bruno aided the conspiracy by furnishing Bell with a place to ply her trade. He benefited financially from her activity (Tr. 80). There is direct evi-

dence that he knew that she had been transported for appellant Bruno actually met her at the airport (Tr. 78). There is direct evidence that he intended to break the law since the trade at which he employed Bell was illegal in itself. It has been said that where proof of a conspiracy has been established a relatively small amount of evidence connecting the defendant therewith is sufficient to sustain a verdict.

Luteran v. U. S. (8th Cir. 1937) 93 F.2d 395, 398.

Here there is direct evidence of appellant Bruno's aid to the conspiracy and that he profited from it (Tr. 78).

In addition, there was evidence of the transient nature of prostitution employment. In a period of less than two months Bell worked in six or seven houses of prostitution. She worked in Folsom, California (Tr. 67, 68, 69), Scottsdale, Arizona (Tr. 71), Delano, California (Tr. 77), Newberry, California (Tr. 83), Isleton, California (Tr. 81), Las Vegas, Nevada (Tr. 86), and Suisun, California (Tr. 89). The evidence further showed that Bruno was an experienced participant in the prostitution racket.

The jury could infer that a man with Bruno's experience would know that Bell would be shipped from place to place in accordance with the demand in various localities for prostitutes. We do not have here a case where the product shipped interstate is of an innocuous nature. The Supreme Court in *Direct Sales Company v. U. S.,* 319 U.S. 793 had occasion to draw the distinction between the legitimate objects of commerce and those by their nature illegal. The *Direct*

Sales Company case involved narcotic drugs and their shipment in pursuance of orders therefor. The court there indicated that a company might not close its eyes to the consequence of its actions, so, too a brothel owner cannot close his eyes to the possibility that the girls he meets at airports might come from out of state.

In *Pine v. U. S.* (5th Cir. 1943) 135 F.2d 353, a contention similar to that made here was made. The defendant there knew the character of the night-club which had received girls from out of the state. There was no direct proof that he knew the specific girls involved had been so transported. The court, however, referred to the peril of taking part in the prostitution business and affirmed his conviction.

It has long been held, of course, that one knowingly receiving stolen property acts at the peril of having them stolen in the course of an interstate shipment.

Clark v. U. S. (5th Cir. 1954) 213 F.2d 63, 64;
U. S. v. Crimmins (2d Cir.) 123 F.2d 271, 273.

In *Van Huss v. U. S.* (10th Cir. 1952) 197 F.2d 120, the defendant supplied title and engine numbers to stolen automobiles. There was no direct evidence that he knew the cars were transported in interstate commerce. However, the court held that the defendant had cooperated in a manner to become an essential part of the crime. In *U. S. v. Mack* (2d Cir. 1940) 112 F.2d 290, where the charge was conspiracy, among other things, to keep an alien prostitute without reg-

istering; that the keeper of a brothel was put at his peril to learn whether a prostitute was an alien.

Conspiracies are rarely, if ever, proved by direct evidence.

U. S. v. Bazzel (7th Cir. 1951) 187 F.2d 878.

When there is a showing, however, that two or more persons engaged in interrelated steps of a plan the inference of a conspiracy is justified. All that is necessary is that there be shown a concerted scheme where each plays "essentially coordinated roles."

U. S. v. Bucur (7th Cir. 1952) 194 F.2d 297, 301.

Here, in respect to the defendant Bruno, we have all the separate interrelated steps which show a common scheme. Ege calls Bell in Arizona and informs her that an opening exists for her services in Delano. He gives her instructions on how to make contact with the brothel owner Bruno. Bruno, with apparent complete understanding of the nature of the plan, meets Bell at the airport, receiving from her no other information other than the time of her arrival. She has no conversation with Bruno, but immediately goes to work. The inference is unmistakable. An agreement was reached between Bruno and Ege concerning the transportation of Bell from the bordello in Arizona to the bawdy house in Delano. From all these circumstances in the case, the nature of the prostitution business, Bruno's connection with it, the meeting at the airport, Ege's conversation with Bell, presupposing an agreement with Bruno, the jury could

infer that Bruno was connected with the conspiracy. In *Mellor v. U. S.* (8th Cir. 1947) 160 F.2d 757, all the evidence showed was that the defendant took a girl across the border to Wyoming and engaged in immoral acts. The court held that this evidence was sufficient to prove his illegal purpose. There will rarely, if ever, be direct evidence of defendant's knowledge of certain facts. *Blackford v. U. S.* (10th Cir. 1952) 195 F.2d 896. All that can be expected in the way of proof is that evidence of sufficient facts to put the defendant on notice of the possible illicit character of the transported merchandise be adduced. The circumstantial evidence in this case was such that the jury could infer that the defendant had joined the illegal agreement to transport prostitutes in interstate commerce. Direct evidence of Bruno's intention when he aided that transportation should not be and is not required. In this case, as in most others, circumstantial evidence of conspiracy is sufficient.

IV. OVERT ACTS COMMITTED IN THE NORTHERN DISTRICT OF CALIFORNIA WERE PROVED.

It is the contention of the appellants that the court lacked jurisdiction because, they claim, no overt act was committed in the Northern District of California.

Overt act 1 charges as follows:

> "In June, 1953, defendants Joseph Boyd, alias Joe Boyd, and Edward Raymond Ege went to 2545 Noriega Street, San Francisco, California, State and Northern District of California."

Appellant Bruno claims at page 34 of his brief that

> "No evidence whatsoever was offered in support of this overt act."

It may be suggested that counsel has neglected to read the record carefully. Mr. Giomi whose market was at 2545 Noriega Street testified that he was introduced to Mr. Ege by Mr Boyd and that Mr. Ege took over the obligation of Mr. Boyd on the house at Monterey Boulevard which was used as a rendezvous for prostitutes (Tr. 196). It was then that Mr. Boyd declared he intended to leave the state (Tr. 196). He did, in fact, leave the state and rent a house in Scottsdale, Arizona in which he advertised the services of two prostitutes who were to come from California (Tr. 212). Mr. Ege testified at page 308 of the transcript as follows:

> "Q. And what transpired after this conversation that you had with Mr. Boyd out at 395 Monterey? What did you do then with reference to getting the lease?
>
> A. Well, we went over to Jean's Market and we talked to this fellow and Joe asked him if it was all right if I took over the lease, and he said it was fine with him, and he told him I was in the Sarong Club at 875 Geary Street, and he said, well, it was O.K. with him if I went ahead and took over his lease.
>
> Q. So you and Boyd went to Jean's Market at Noriega Street [293] and had a discussion with Mr. Giomi, is that right?
>
> A. If the place was on Noriega, that's where we went to, Jean's Market."

To be sure, the renting of the Monterey Boulevard establishment apparently took place in the month of May rather than the month of June. The bill of particulars, however, states that the conversation occurred *on or about* June 15. The government is not required to set forth the exact date on which a crime is committed, and the allegation of a day certain will permit proof of the admission of the crime on any other day within the statute of limitations.

Cornett v. U. S., 7 F.2d 531;
Peterson v. U. S., 4 F.2d 702.

Overt act 2 is claimed by appellant Bruno, at page 35, not to have taken place at all.

Overt act 2 reads as follows:

> "In September, 1953, defendant Edward Raymond Ege, took one Constance Marie Bell from the Sarong Club, 875 Geary Street, City and County of San Francisco, State and Northern District of California, to 395 Monterey Boulevard of said City."

Constance Marie Bell testified at page 62, following her description of a meeting with Ege at the Sarong Club, as follows:

> "Q. What happened between you and Ege after that meeting in the Sarong Club? Where did you go, and do, if anything?
> A. We went out to his house.
> Q. And where was that?
> A. On Monterey Boulevard.
> Q. In San Francisco?
> A. Yes.

Q. And was that on the occasion right after this initial meeting with him at the Sarong Club?

A. Yes."

At page 35 of his brief, appellant Bruno makes this statement:

"She went there of her own accord with her friend Rosalie."

What relevance this has to a contention by appellant Bruno that overt act did not take place at all is difficult for appellee to undertsand. The overt act alleges nothing concerning the voluntary and involuntary character of the trip. Ege obviously took Bell to the house at Monterey Boulevard for the purpose of persuading her to enter the prostitution business. It was, therefore, in pursuance of one of the objects of the conspiracy, which was to transport Bell to Scottsdale, Arizona to work as a prostitute in Boyd's brothel.

Overt act 3 refers to the conversation between Bell and Ege at 395 Monterey Boulevard where Constance Marie Bell testified Ege persuaded Bell to enter the prostitute racket (Tr. 62 through 65). Appellant objects that Boyd and Bruno were not present at this conversation. He concludes that in their absence "any conspiracy would necessary have to be performed thereafter" (Appellant's Brief, page 36). The cases are uniform, however, that conspirators need never have met.

Allen v. U. S., 4 F.2d 688, 691;
Coates v. U. S., 59 F.2d 173, 174.

The presence of the other co-defendants at the time of an overt act is entirely immaterial. Appellant Bruno has pointed to no reason whatsoever requiring the jury to find that the conspiracy was formed subsequent to Ege's recruitment of Bell in the prostitution racket. The inferences are all the other way, and on appeal those inferences most favorable to the government case are adopted.

Barcott v. U. S. (9th Cir.) 169 F.2d 929, 931;
Henderson v. U. S. (9th Cir.) 143 F.2d 681;
Gendelman v. U. S. (9th Cir.) 191 F.2d 993.

Appellant Bruno apparently seeks to have this Court infer that overt act 4 did not occur. Constance Marie Bell had testified that she had gone to Folsom to Ege's house of prostitution and had her first experience in prostitution work there (Tr. 68-69). The Folsom trip was obviously taken for the purpose of preparing Bell for her work in Arizona. At page 70 of the record the following testimony occurs:

"Q. (by Mr. Sparrow). Do you remember about when this was, Connie?

A. It was probably in the latter part of September.

Q. 1953?

A. Yes.

Q. What happened, you testified that you stayed at Folsom about a week or so, what happened thereafter?

A. I left. Eddie came and took me.

Q. And where did he take you?

A. Back to Monterey Boulevard.

Q. An how did he take you?

A. In his car.

Q. What sort of a car?
A. A Cadillac."

Appellant Bruno's arguments at page 36 of the brief concerning this overt act are based on a complete distortion of what the record discloses. Perhaps, to be charitable, however, appellant Bruno has merely failed to read the record with reference to this overt act.

As far as overt act 5 is concerned it appears that Judy Berg rather than Constance Marie Bell actually recorded the number of the defendant Joseph Boyd (Tr. 173). She was told, however, by Ege to telephone Boyd (Tr. 173). Overt act 5 was only important insofar as it involved an act by Ege calculated to bring together the prostitutes Bell and Berg with the brothel owner Boyd. There is no doubt but that his supplying the telephone number to the girls actually resulted in a meeting with Boyd and work by the girls in the Boyd house of prostitution.

Counsel for Bruno has felt called upon to question the government's good faith in reference to this overt act. The immaterial nature of the variance between the allegation and the proof, with reference to this overt act, causes some question in appelee's mind concerning the "reluctance" of appellant Bruno to question the government's honesty. In the course of a criminal trial it is inevitable that the evidence will at times vary from that originally expected by the government. It would be a sorry thing if the government's good faith could be questioned in every case where a variance occurred.

Overt act 8 is questioned because it is contended that no proof was introduced indicating that Ege had called from San Francisco. The obvious inference presented by the evidence in the case, however, was that San Francisco was the place of the call. Bell left Ege in San Francisco (Tr. 123). There was no evidence that he had gone anywhere else to make his telephone call. According to the evidence he was a resident of San Francisco. When not driving prostitutes across the state borders he remained there. If Ege were somewhere else than San Francisco when he made that call he could have so testified. He merely denied that the telephone call had taken place at all (Tr. 295). The jury was free to reject his testimony.

Overt act 10 charges that Ege accepted money from Bell in San Francisco. The evidence established that after leaving Bruno's brothel Bell was met by Ege in Fresno and driven back to San Francisco. Bell testified that she did in fact give Ege the money secured from her work as a prostitute, but that she could not recall whether Ege took it in San Francisco or in Fresno (Tr. 186).

In appellant's argument concerning the insufficiency of the evidence to establish that any of the overt acts charged occurred in the Northern District of California the same tendency is apparent as in their other arguments. Appellants would have this Court view the evidence in the light most favorable to them. In both their brief and their summaries of evidence they ignore evidence in favor of the government's case, and state as facts inferences not accepted by the jury. A

great deal is made of certain minor variances in the time, *on or about,* in which the overt acts in the conspiracy were committed. There is no intimation in any of the briefs how this difference in the dates prejudiced their defense. It must be remembered that the events involved in this case took place over a very short period of time. The question of time had nothing to do with the defendants' guilt or innocence of the charge.

The Supreme Court of the United States in the case of *Ledbetter v. United States,* 170 U.S. 606 stated:

> "Good pleading undoubtedly requires an allegation that the offense was committed on a particular day, month and year, but it does not necessarily follow that the omission to state a particular day is fatal upon a motion in arrest of judgment. Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any date before the finding of the indictment, and within the statute of limitations, will be sufficient."

See also:

Younge v. U. S. (4th Cir. 1917) 242 Fed. 788, 793.

It is undisputed that Bell worked as a prostitute in Arizona, Delano and many other places. The evidence is overwhelming that Ege controlled her movements in that respect, and that Boyd and Bruno assisted him by supplying places of employment. When these

things occurred was unimportant. The fact that they occurred showed the existence of a conspiracy between the three appellants to violate the White Slave Traffic Act. All that is necessary to secure jurisdiction is that one overt act be committed within the jurisdiction of the court.

Rubio v. U. S. (9th Cir.) 22 F.2d 766;
Parmagini v. U. S. (9th Cir.) 42 F.2d 721;
Heskett v. U. S. (9th Cir.) 58 F.2d 897;
Woitte v. U. S. (9th Cir.) 19 F.2d 506.

The proof here sufficiently establishes that overt acts were committed in the Northern District of California.

V. A SPECIAL VERDICT WAS UNNECESSARY.

It has long been held that *only* general verdicts are proper in federal criminal cases.

Anderson v. U. S. (9th Cir.) 273 Fed. 677;
U. S. v. Noble (3d Cir. 1946) F.2d 315.

In *Gray v. United States* (8th Cir. 1949) 174 F.2d 919, the Court of Appeals reversed the trial court for requiring the jury to make special findings. The court stated that such action was not sanctioned by statute, Rules of Criminal Procedure, or any precedent. It declared such a verdict was an innovation in American criminal practice. As the court observed in the *Gray* case, the accepted procedure is to charge but one crime in one count, to accept one general plea to it, and to call upon the jury to make but one general response—guilty or not guilty.

Appellants cite *Cramer v. United States* (1944) 325 U.S. 1, for the proposition that special verdicts are required in a conspiracy case. The *Cramer* case was a treason case. The very basis for the reversal there was the difference in the nature of overt acts in treason cases from the nature of overt acts in conspiracy cases. Prosecution for treason is defined by the Constitution. The overt acts proved must correspond with the Constitutional definition of an overt act. Neither the *Cramer* case nor *Stromberg v. California* (1930) 283 U.S. 359, and *Williams v. North Carolina* (1944) 317 U.S. 287, upon which the *Cramer* case relies, stand for the proposition urged by appellants. The only other case which they present to this Court, *Samuel v. United States* (9th Cir. 1948) 169 F.2d 787, expressly repudiates their position. Citing *Kepl v. United States* (9th Cir.) 299 F. 590, this Court declared:

> "It matters not that some overt acts alleged in the indictment were not sufficiently proved" (at page 796).

See also

Bruno v. U. S. (9th Cir. 1933) 67 F.2d 416.

The *Samuel* case turned upon the interpretation of the Price Control Act. The court expressly distinguished the situation there from one where a contention was made that certain overt acts in an indictment were supported by insufficient evidence in the following language:

> "The Kepl case and those like it concern only the proof as to overt acts. It matters not that some

overt acts alleged in the indictment were not sufficiently proved. The reason for this is that since verdicts of juries must be viewed as the work of ordinary intelligent and reasoning beings, judges will not presume that a jury would find guilt upon an item not proved but that they would find guilt upon an item well proved. The difference between the instant and the cited cases is as plain as daylight. In our case intelligent and reasonable consideration by the jury of the whole case, as given it, would almost surely have lead to a wrong application of important testimony. In the cited case intelligent and reasonable consideration of the whole case would only result in a just verdict upon conclusions supported by evidence. In our case we are not concerned with the mere matter of insufficient proof as to some alleged overt acts. We are concerned with the stern fact that appellants may have been convicted of a conspiracy to violate a non-existent law or that they may have been convicted of a conspiracy to violate existing law because of the logicial application of the non-existing law to the evidence introduced."

There is no reason for requiring a special verdict in a conspiracy case. The same arguments that may be urged in favor of such a special verdict may be advanced in favor of special verdicts in all criminal cases. It is always possible that the jury may have found one, but not all of the essential elements of the crime. The courts, however, have felt that justice is best secured by a general verdict of guilty and not guilty. While special verdicts are authorized in civil cases, they are not so authorized in criminal cases. In the lack of any Constitutional provision requiring or

authorizing such a procedure the District Court would have committed reversible error in adopting the procedure contended by appellants.

VI. THE JURY WAS INSTRUCTED ITS VERDICT MUST BE UNANIMOUS.

One argument that is made by appellants seems somewhat obscure to appellee. At page 22 of appellant Boyd's brief it is claimed,

> "Nowhere did the court instruct the jurors that they must all agree on at least one of the overt acts charged."

The court stated:

> "In order to convict or acquit the defendant on any count, you must reach a unanimous verdict as to each count. It will take all 12 of you to convict or acquit, as the case may be, on each count" (Tr. 349).

and further:

> "Now, this is a criminal case, and as I have indicated before, your verdict must be unanimous; that is to say, all 12 of you must agree upon a verdict" (Tr. 363-364).

It is difficult for us to understand what more appellants desired the court to do, short of arguing their case for them. They admit that the requirements that an overt act be proved was explained to the jury. The record shows the court required that the jury's verdict be unanimous. On at least two occasions the court specifically instructed that a unanimous verdict was

required in language no one could misunderstand. This contention by appellants is completely without merit.

VII. THE REMARKS OF THE COURT AND GOVERNMENT COUNSEL WERE NOT PREJUDICIAL.

Appellants contend that certain remarks by the court and counsel during the course of the trial prejudiced the defendants to an extent justifying reversal.

The court, at page 146 of the record (quoted at page 43, appellant Bruno's brief) in answer to the question of an obviously excited, upset and hysterical witness, stated as follows:

> "Just a moment. Just a moment: Just calm yourself. Now take it easy. You have been doing very nicely. Just answer the gentleman's questions. If you don't remember, just say so. Don't let him get you excited. I'll protect you. That is what I am here for.
>
> Mr. Stout [Counsel for Mr. Ege]. I hope she doesn't need the protection, Your Honor.
>
> The Court. If she does, she will get it.
>
> Mr. Stout. I won't put her in a spot where Your Honor will have to protect her. I assure you of that.
>
> The Court. You better not."

It is to be noted that no objections were made to the court's remarks at the time they were made, or as a matter of fact, at any other time until the matter was presented to this Court. In the absence of such an objection, the error, if any, is waived.

U. S. v. Thayer (7th Cir. 1954) 209 F.2d 538.

It could not be said that this remark by the court was such a plain error or defect that it might be noticed although not brought to the attention of the court under Rule 52b of the Federal Rules of Criminal Procedure. Comments of the court must be read in their context and viewed with a perspective of the whole proceedings.

Ochoa v. U. S. (9th Cir. 1948) 167 F.2d 341.

In this case the witness had been subjected to long and arduous cross-examination from vigorous counsel. A positive duty rested with the court to prevent cross-examination from degenerating into a badgering of the witness. The trial court and the trial court alone was in a position to judge the condition of the witness and the attitude of counsel. As the court stated in *United States v. Angelo* (3d Cir. 1946) 153 F.2d 247, the proper administration of justice requires the vesting of discretion in the trial judge,

> "To stop cross examination, to control and direct the jury and to protect the trial from degenerating into a barren battle of words."

Appellants have tried to imply that the remark of the court to which they now object was made in connection with the remark of government counsel, which they consider objectionable. At page 44 of appellant Bruno's brief this statement is made:

> "The statement of prosecuting counsel that the witness feared retaliation, and the trial judge's statements of protection in connection therewith gratuitously repeated when the witness was being pressed for answers on material matters, must necessarily have created an adverse impression in

> the minds of the jurors extending not only to the defendants, but to their respective counsel as well."

This interpretation of the court's remarks is a complete distortion of what the record discloses. The remark concerning the witness' apprehension of retaliation was made at page 93 of the record. The court's remark occurred at page 146 of the record, over 50 pages later in the transcript, 50 pages of transcript in which the witness was subjected to more than vigorous cross-examination by appellants' industrious counsel. Prior to the time the court made the remarks objected to, the witness apparently came close to breaking down. At page 125 of the record the witness Constance Marie Bell answered as follows:

> "A. Well, it wasn't Scottsdale that I was going to, but I was—I mean, when we went to Phoenix, it was in Phoenix that Judy was going to call Scottsdale or the motel there, I mean, they asked me questions that—I mean, that's—I mean, I answered them and then they sound like I'm contradicting myself, the way he puts it."

The court answered this remark of the witness in the following way:

> "The Court. That's all right. You're doing fine. Now, don't you allow these gentlemen—they are not trying to confuse you. They have a duty to perform to their clients, you understand.
>
> A. I know. They're twisting me around.
>
> The Court. They're not trying to embarrass you. They are only trying to perform their duties under their oath, you appreciate that?
>
> A. Yes.

Q. Are you getting tired? [81]
A. Oh, I can go on."

No judge could have been more kind or solicitous of counsel and the rights of their clients than Judge Murphy was during these remarks. Vigorous cross-examination of a female witness to the extent that she comes close to breaking down is a two-edged sword. It may well be that the jury itself was beginning to feel that counsel was exceeding the bounds of propriety in "vigorous" cross-examination. Judge Murphy put the best face possible on counsel's actions. However, by page 146 of the record, the court obviously felt that the time had come to indicate to counsel that enough was enough. This, as a judge of the United States District Court, he was under duty to do. Furthermore, the court instructed the jury as follows:

> "So therefore at the very outset I charge you that you must not consider for any purpose whatsoever any testimony or evidence which has been by order of the Court stricken out. Such testimony or evidence should be treated by you as though you had never heard it. * * * It may have occurred during the trial of this case that the Court has been called upon to make certain comments and ruling upon the objections of counsel and upon motions made by them. You should not draw any inference from any such remarks or comments or rulings of the Court that I may have had occasion to make that this Court was intending to convey to the jury in any manner whatsoever its view or opinion as to what the verdict or decision of the jury should be. Such comments as

> I may have had occasion to make in that regard were only pursuant to the power, and indeed, the duty of the court to supervise the trial of this case and to expedite it."

The objection of appellants that Judge Murphy denied them a fair trial by his remarks is completely without merit, and demonstrates only the lengths they are required to go to find some fact in the record upon which to base an argument.

The Goldberg testimony.

Appellant Bruno complained that the prosecution, with what they call "the assistance of the trial judge," introduced evidence seeking to establish the reputation of appellant Bruno as a pimp. Page 40, appellant Bruno's brief. The evidence admitted at the trial not only sought, but did establish beyond any reasonable doubt that Bruno was a pimp. The evidence was uncontradicted that he operated a house of prostitution, bordello, bawdy house, or call it what you will, at Delano, California, and that his principal activity was counting money secured by the women employed there from the practice of prostitution. The witness John Goldberg only testified as to the meaning of certain expressions in the prostitution business. Constance Marie Bell had used those expressions in her testimony. The government attempted to qualify Mr. Goldberg, who apparently conducted a business ancillary to the prostitution racket, as an expert in the meaning of certain phrases in the prostitution business. In addition he was familiar with the character of the Delano house. Whether or not this testimony

was admissible is a closed question. The trial judge decided the question adversely to the government.

> At page 352 the court instructed the jury as follows: "I further instruct you that the testimony of the witness Goldberg—you remember him, the lingerie entrepreneur who came here—is stricken from the record, and that you are not to consider it for any purpose whatsoever."

This testimony was stricken. The jury was instructed not to consider it in the case. Appellants were apparently satisfied with this instruction since at the time of exceptions to instructions they made no objections. The record does not disclose any motion made by appellant with particular respect to the Goldberg testimony, under Rule 30 F.R.C.P. Appellant Bruno's statement as to the court's action, with respect to the Goldberg testimony, as "the grossest single error" in the case gives rise only to this inference. If they consider the introduction of testimony stricken from the record the worst of the alleged errors on which they depend for reversal, the rest of their contentions must be weak indeed.

The prosecutor's remarks.

An objection was made by the attorney for the government, Mr. Sparrow, to a question requesting the witness Constance Marie Bell's address. The court overruled the objection, and addressed a remark to the government counsel, which in essence was a request for the reason for the objection. Mr. Sparrow answered the court by saying, "The witness is apprehensive of possible retaliation against her." Nothing

was said concerning any threats, if any, made against the witness by the defendants, and counsel for the defense at no time questioned government counsel's good faith in the statement made to the court. The objection of government counsel was overruled, and the witness was required to give her address (Tr. 93). The court, after being requested to instruct the jury that they were not to draw any conclusions from the remarks of counsel stated, "I will do that at the proper time." Thereafter the court instructed the jury as follows:

> "Now while it was your duty to listen and consider the arguments of the attorneys in the case, I instruct you that such arguments are not evidence, and that the only legitimate purpose of the arguments of the attorneys is to assist you in arriving at a proper verdict from the evidence in the case, applying to such evidence the law as given to you by the court."

And at page 355 the court observed:

> "The defendants here are to be tried only on the evidence which is before this jury and not upon suspicions that may have been excited by questions of counsel, the answers to which were not permitted" (Tr. 355).

Appellants nowhere challenge Mr. Sparrow's good faith in responding to the court's question. The statement by counsel for the government was in pursuance of the duty of the United States Attorney to protect its witnesses. A witness for the government is not in a happy situation. The witness Constance Marie Bell in this case was subject to hours of grueling cross-

examination. She was forced to degrade herself before the jury. While it is, of course, the duty of defense counsel to represent their clients, it is no less a duty for government counsel to protect the government witnesses to the greatest extent possible. Judge Murphy handled this situation with the greatest possible fairness to the defense. See

Sullivan v. U. S. (9th Cir. 1929) 32 F.2d 992.

See also

Beard v. U. S. (C.A.D.C. 1936) 82 F.2d 837.

VIII. APPELLANTS WERE PROPERLY CHARGED WITH CONSPIRACY TO VIOLATE SECTION 2421 OF TITLE 18 UNITED STATES CODE, AND APPELLANT WAS PROPERLY CHARGED WITH A SUBSTANTIVE VIOLATION OF THAT SECTION.

Appellants Boyd and Bruno argue that the proper charge in this case should have been conspiracy to violate Section 2422 of Title 18 U.S.C., that is, conspiracy to persuade, induce, entice and coerce a woman to go from one place to another in interstate commerce for the purpose of prostitution, rather than conspiracy to violate Section 2421 of Title 18, U.S.C., that is, conspiracy to cause the transportation in interstate or foreign commerce of a woman for the purpose of prostitution. At the outset it must be emphasized that appellants Boyd and Bruno are not charged with the substantive crime of causing Bell to be transported in interstate commerce. They are charged only with conspiracy to cause the transportation of women in interstate commerce. If they agreed with Ege to cause

the transportation of women in interstate commerce, and anyone of them did any act to effect the object of that conspiracy, whether successful or not, they would be guilty of an offense. It is immaterial whether or not the conspiracy succeeds. Any party coming into a conspiracy at any stage of the proceedings with knowledge that an illegal scheme or conspiracy is in operation becomes, under the law, a party to and responsible for all acts done by any of the other parties either before or afterwards in furtherance of the common design. One who joins such a scheme or conspiracy adopts for himself and becomes responsible for all that proceeded, as well as what is done during his personal participation.

Levey v. United States (9th Cir.) 92 F.2d 688, 691;

United States v. Buckner, 108 F.2d 921, 930;

Robinson v. United States (9th Cir.) 33 F.2d 238, 240;

Marino v. United States (9th Cir.) 91 F.2d 691;

Interstate Circuit v. United States, 306 U.S. 208, 227;

Van Riper v. United States, 13 F.2d 961;

Roberts v. United States (9th Cir.) 248 F. 873, 880.

Appellants' argument, however, seems to be founded on the premise that in order to be guilty of causing a woman to be transported in interstate commerce for the purpose of prostitution, or conspiracy to so transport, the defendants must have personally transported

the woman. This is a misconception of the requirement of the statute. As was stated in *Wright v. U. S.* (8th Cir. 1949) 175 F.2d 384:

> "We have no doubt that one who deliberately aids or deliberately brings about the interstate transportation of a woman for immoral purposes is as guilty of the offense of transporting her as though he had physically and personally carried her across the state line."

Or see for example *Lawrence v. U. S.* (9th Cir. 1947) 162 F.2d 156, where someone else actually delivered the woman across the line, the defendant stating at the time, "He wasn't supposed to drive across the state line." In this case appellants Boyd and Bruno caused the transportation of Bell by providing employment for her. Just as a retail druggist causes the shipment of drugs in interstate commerce by ordering them from the manufacturer in another state, or a prize fight promoter causes a boxer to travel to his arena by providing him with a match, and just as a theatrical impresario causes actors to travel to his theatre when he provides a play in which they can appear, so Boyd and Bruno caused Bell to be transported in interstate commerce by providing the place in which she could offer her services.

In *Schrader v. U. S.* (8th Cir. 1948) 94 F.2d 926, a madam was prosecuted for causing a woman to be transported in interstate commerce for the purpose of prostitution. She provided the place of employment. The 8th Circuit held that she had effectively caused the transportation and affirmed the conviction.

In *Wagner v. U. S.* (5th Cir. 1948) 171 F.2d 354, 363, the same contention as here was made, that is to say, only an inducement and persuasion was involved and Section 2422 rather that 2421 was applicable. The court stated that it was clear that they not only induced and enticed the transportation of the woman, but that they made it attractive to her, thereby causing her to go. Ege arranged for Constance Marie Bell's job. Furthermore, on the transportation to Arizona, in which he is charged in the first count of the indictment, he provided the means for her travel. That is, he gave her $50 to cover her expenses (Tr. 72). It was by means of this money that Bell made the trip. To be sure, Ege induced and persuaded Constance Marie Bell to go, but he did more than that. By his action her transportation was caused. Without Ege's activities as an "agent" Bell would not have had her place of employment in Delano nor in Arizona nor in Las Vegas. All his activities with respect to Bell were directed towards her employment as a prostitute and the transportation in part in interstate commerce, which was a necessary incident of her prostitution activities.

We believe that the evidence is sufficient to show that the defendants Boyd and Bruno were guilty of the substantive offenses of causing Bell to be transported in interstate commerce for the purpose of prostitution. They, however, were not charged with that. They were charged only with conspiracy of transportation. There is sufficient evidence from which the government could so find, even if it be concluded that Ege alone caused Bell's transportation. Once a conspiracy

is proven only one defendant need take an overt act in pursuance of its object for the crime to be complete.

IX. THE COUNTS IN THE INDICTMENT NEED NOT HAVE BEEN SEPARATED.

Rule 8a of the Federal Rules of Criminal Procedure provides as follows:

> "Two or more offenses may be charged in the same indictment or information in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character, or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Appellants contend that Ege's charge under count 1 should have been separated with their trial on the conspiracy count of the indictment. Appellant Bruno argues, at page 51 of his brief, that counts 1 and 2 should be severed because the testimony regarding Ege's early meetings with Bell were prior to the formation of the conspiracy, and not admissible against Boyd or Bruno, and prejudiced them. We take sharp issue with appellant's assumption that conversations and activities referred to were prior to the formation of the conspiracy. In our opinion the evidence clearly shows that they were part and parcel of the conspiracy. However, the evidence would have been admissible against Ege on the *conspiracy* count of the indictment in any event. Even if the severance desired by appellants had been granted Boyd and Bruno would be in no better position. The court instructed at page 350 of the transcript as follows:

"In this trial there have been instances when evidence was admitted which may properly be considered by you only against some of the defendants and not against others. And I shall now instruct you as to the manner in which you must do so.

You are not to consider any statement or statements made by one defendant out of the presence of another defendant as evidence against such defendant. Thus, for example, the statements made by Boyd in Scottsdale, Arizona, are not to be considered by you as against Ege and Bruno. Or are any conversations had between Ege and Boyd in San Francisco to be considered by you as evidence against the defendant Bruno. Nor are any activities of Bruno in Delano or Bakersfield to be considered by you as evidence against Ege or Boyd.

However, there is an exception to the rule that I have just given you. The law allowed the statement and admissions of one conspirator to be admitted against his fellow conspirator if the statement is made by one of them in furtherance of the conspiracy. Therefore, if and only if you first find that there was a conspiracy in existence at the time of the statement and that the statement was made by one of the conspirators in furtherance of the conspiracy, then you may [342] regard it as evidence against every other person whom you may have found to be a member of the conspiracy at the time of the statement.

For example, if you find that there was a conspiracy between Boyd and any other person or persons at the time of Boyd's statements in Scottsdale, Arizona, then you may consider anything said by Boyd which you believe to be in further-

ance of the conspiracy as evidence against every other person in the conspiracy. If you do not first find such a conspiracy, or if you do not find any statement made by one of the conspirators to be in furtherance of the conspiracy, then you may use the statement of any defendant as evidence only against him and not against the other defendants.''

Appellants could not ask for an instruction more fairly limiting the evidence against them to that which would properly be admissible against them. Under Rule 8 the counts in the indictment were properly joined since they referred in part at least to the same transaction. To have required the court to go through the expense and inconvenience of two trials in this case would have been ridiculous.

CONCLUSION.

Appellants have received a fair trial and were properly convicted. The judgments, and each of them, should be affirmed.

Dated, San Francisco, California,
August 27, 1956.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

INDICTMENT.

First Count. (Title 18, United States Code, Section 2421.)

The Grand Jury charges That:

Edward Raymond Ege, defendant herein, did on or about the 17th day of October, 1953, in the City and County of San Francisco, State and Northern District of California, knowingly transport in interstate commerce, to wit, from San Francisco, California, to Scottsdale, Arizona, a woman for the purpose of prostitution.

Second Count. (Title 18, United States Code, Section 371.)

The Grand Jury further charges:

That Edward Raymond Ege, Joseph Boyd, alias Joe Boyd, and Joseph Victor Bruno, at a time and place to the Grand Jury unknown, in violation of Title 18, United States Code, Section 371, did conspire together, and with other persons to the Grand Jury unknown, to commit an offense against the laws of the United States of America, in that they and each of them did conspire, in violation of Title 18, United States Code, Section 2421, knowingly to transport women between California and Arizona and California and Nevada for the purpose of prostitution.

Thereafter and during the existence of said conspiracy and in furtherance thereof and to effect the ob-

jects thereof, one or more of the said defendants, hereinafter mentioned by name, did the following acts.

Overt Acts.

1. In June, 1953, defendants Joseph Boyd, alias Joe Boyd, and Edward Raymond Ege, went to 2545 Noriega Street, San Francisco, California, State and Northern District of California.

2. In September, 1953, defendant Edward Raymond Ege, took one Constance Marie Bell from the Sarong Club, 875 Geary Street, City and County of San Francisco, State and Northern District of California, to 395 Monterey Boulevard of said City.

3. In September, 1953, at 395 Monterey Boulevard, City and County of San Francisco, State and Northern District of California, defendant Edward Raymond Ege had a conversation with Constance Marie Bell.

4. In October, 1953, defendant Edward Raymond Ege drove an automobile from Folsom, California, to 395 Monterey Boulevard, City and County of San Francisco, State and Northern District of California.

5. In October, 1953, at 395 Monterey Boulevard, City and County of San Francisco, State and Northern District of California, defendant Edward Raymond Ege, gave the telephone number in Arizona of Defendant Joseph Boyd, alias Joe Boyd, to Constance Marie Bell.

6. In October, 1953, Constance Marie Bell in the State of Arizona had a telephone conversation with defendant Joseph Boyd, alias Joe Boyd.

7. In October, 1953, defendant Joseph Boyd, alias Joe Boyd, drove Constance Marie Bell in an automobile from Phoenix, Arizona, to Scottsdale, Arizona.

8. In October, 1953, Constance Marie Bell in the State of Arizona had a telephone conversation with Edward Raymond Ege in the City and County of San Francisco, State and Northern District of California.

9. In October, 1953, defendant Joseph Victor Bruno drove Constance Marie Bell from Bakersfield, California, to Delano, California.

10. In October, 1953, in the City and County of San Francisco, State and Northern District of California, defendant Edward Raymond Ege took the sum of approximately $700 from Constance Marie Bell.

11. In October, 1953, defendant Edward Raymond Ege drove Constance Marie Bell from the City and County of San Francisco, State and Northern District of California, to the County of Yolo, State of California.

12. In November, 1953, defendant Edward Raymond Ege drove Constance Marie Bell from the City and County of San Francisco, State and Northern District of California, to the City of Barstow, State of California.

13. In November, 1953, in the City of Barstow, State of California, defendant Edward Raymond Ege took the sum of approximately $900 from Constance Marie Bell.

14. In December, 1953, defendant Edward Raymond Ege drove Constance Marie Bell from the City

of Barstow, State of California, to the City of Las Vegas, State of Nevada.

A True Bill.

/s/ D. Gordon Tyndall,
Foreman.

BILL OF PARTICULARS

Comes now the United States of America, through its attorneys, Lloyd H. Burke, United States Attorney for the Northern District of California, and John P. Sparrow, Assistant United States Attorney, and gives particulars as to the following matters alleged in the indictment herein.

I.

First Count.

1. The name of the person described as "the woman" is Constance Marie Bell.

2. The woman referred to in the first count, namely, Constance Marie Bell, is one of the women referred to in the second count and the overt acts thereunder.

II.

Second Count.

1. Constance Marie Bell is one of the women whom the defendants conspired to transport between California and Arizona.

2. Constance Marie Bell is one of the women whom the defendants conspired to transport between California and Nevada.

3. The approximate day of the month on which each of the overt acts are alleged to have taken place is as follows:

(1) On or about June 15, 1953.

(2) On or about September 15, 1953.

(3) On or about September 15, 1953.

(4) On or about October 13, 1953.

(5) On or about October 20, 1953.

(6) On or about October 22, 1953.

(7) On or about October 22, 1953.

(8) On or about October 25, 1953.

(9) On or about October 27, 1953.

(10) On or about November 5, 1953.

(11) On or about November 10, 1953.

(12) On or about December 7, 1953.

(13) On or about December 20, 1953.

(14) On or about December 22, 1953.

Dated: August 4, 1955.

LLOYD H. BURKE,
United States Attorney,

/s/ JOHN P. SPARROW,
Assistant United States Attorney,
Attorneys for Plaintiff.

[Endorsed]: Filed August 4, 1955.

STATUTES INVOLVED.

Title 18 United States Code, Section 371.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 United States Code, Section 2421.

Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or * * *

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.